LIN SECURITIES PTE.

v.

NOONE & CO. SDN. BHD. & ANOR. (1)

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C23-1052-86]

CIVIL PROCEDURE: *Security for costs - Plaintiff may not be able to pay costs - Whether this is a ground for making order for security for costs - Exceptions - Plaintiff resident outside jurisdiction - Where plaintiff is a company - Principles applicable - Order 23 r. 1(1) Rules of the High Court 1980 Section 351(1) Companies Act 1965.*

The plaintiff and defendant were stocks and share holders in Singapore and Kuala Lumpur respectively. The plaintiff claimed the balance of the purchase price of shares that were to be delivered pursuant to a contract note dated 6 November 1986. They instituted O. 14 proceedings against the defendant. Before the O. 14 hearing the defendant's application for security for costs to be furnished by the plaintiff came before the Senior Assistant Registrar, who granted an order in the terms of defendant's application. The plaintiff appealed.

Held:

[1] Where an application for security for costs comes up when O. 14 proceedings are pending, the application for security for costs should be stood over until the disposal of the O. 14 application. Appeal allowed with costs. If the O. 14 application is dismissed the plaintiff is directed to deposit with the Court RM20,000 as security for costs as a condition to the plaintiff proceeding further. Liberty to apply granted.

[2] A plaintiff even if resident outside the jurisdiction and is a limited liability company in liquidation who has moved for summary judgment under O. 14 or who has invoked O. 18 r. 19 proceedings should not be thwarted from having its application disposed of by an order for security for costs.

[Appeal allowed with costs.]

Case referred to:
Crozat v. Brigden [1984] 2 QB 30

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 23 r. 1(1)
Companies Act 1965, s. 35, (1), s. 315(1)
Companies Act [UK], s. 477

For the plaintiff/appellant - Porres P. Royan; M/s. Shook Lin & Bok
For the defendant/respondent - J.S. Gill; M/s. Gill Cheah & Co.

JUDGMENT

VC George J:

[On encl. 16]

That a plaintiff may not be able to pay the costs is not a ground for making an order for security for costs. There are only two exceptions to this:

(1) As per O. 23 r. 1(1) of the Rules of the High Court 1980 in the case of plaintiff who is only a nominal plaintiff and is suing for the benefit of some other person and where such plaintiff may not be able to pay the costs. and

(2) As per s. 315(1) of the Companies Act 1965 in the case of a plaintiff company, that may not be able to pay the costs.

Section 315(1) of the Companies Act 1965 is as follows:

> where a company is plaintiff in any action or other legal proceeding the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

Order 23 r. 1(1) is as follows:

> 1(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court:
>
> (a) That the plaintiff is ordinarily resident out of the jurisdiction; or
>
> (b) That the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or
>
> (c) Subject to para. (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or
>
> (d) That the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,
>
> then, if having regard to all the circumstances of the case, the Court thinks it just to do so, may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

The 1st exception is no doubt to discourage litigation brought about by impoverished nominal plaintiffs who have no direct interest in the claim and who can cock a snook at successful defendants when the costs of the litigation are sought to be recovered. It must have been the same kind of thinking that actuated the formulation of s. 351(1) of the Companies Act 1965. The equipollent English section is s. 447 and has reference not to all companies but only to limited companies. No doubt it was felt that a company which is entitled to shelter behind the limited liability of its shareholders or guarantors should not be allowed to sue without providing security for costs. Otherwise many of them could also be able to cock a snook at a successful defendant who seeks to recover costs.

No doubt our s. 351 was inspired by the English s. 447 and the equipollent Australian section although the application of our s. 351 is not restricted to only limited companies. However, most companies incorporated under our Companies Act 1965 are companies limited by shares and or guarantees.

Of three other situations provided for by O. 23, two are in respect of a plaintiff who manifests intentions of evading the consequences of the litigation either by not giving his correct address or by changing his address midstream during the course of the proceedings. Even though it may be obvious that the plaintiff will not be able to meet costs that may be ordered against him, *per se*, unless he takes those specified positive steps that presume and evasion of the consequences of litigation, security for costs may not be ordered.

The third is the case of the plaintiff normally resident outside the jurisdiction. The thinking behind the inclusion of this class of plaintiffs in O. 23 must be the difficulties that may be placed in the path of a successful defendant in trying to recover his costs outside the jurisdiction of the Court.

In every one of the situations dealt by O. 23 and s. 351 the Court has a discretion whether to order security for costs. In the case of the foreign plaintiff, whether the defendant would face significant difficulties in seeking to recover the costs and the degree of the anticipated difficulties have to be considered. Recovery of costs in Singapore will surely be very much more easily achieved than in say, Timbuktu. In the case of Singapore, a jurisdiction with which we in Malaysia are very familiar, the procedures and the implementation of such procedures for recovery of costs will not prove to be all that more difficult than would have been the case of recovering costs from a litigant within the jurisdiction. Generally I would not be inclined to order security for costs against a plaintiff ordinarily resident in Singapore. But what if the plaintiff resident outside the jurisdiction in Singapore is a company limited by liability and which is in liquidation? In that kind of situation the Court should, I think, exercise its discretion in favour of the defendant applicant unless it is obvious that the defendant will fail in his defence. See per Collins J in *Crozat v. Brigden* [1984] 2 QB 30 at 33. It would be a denial of justice to order a plaintiff to give security for the costs of the defendant who has no defence to the claim. And I do not think that a plaintiff even if resident outside the jurisdiction and is a limited liability company in liquidation who has moved for summary judgment under O. 14 or who has invoked O. 18 r. 19 proceedings should be thwarted from having its application disposed of by an order for security for costs.

In the instant case O. 14 proceedings were pending when the application for security for costs came up before the Senior Assistant Registrar. It seems to me that what the learned Senior Assistant Registrar should have done was to have had the application stood over until the disposal of the O. 14 application.

The appeal is allowed with costs. I direct that a condition to the plaintiffs proceeding with the litigation in the event the O. 14 application is dismissed and any appeal therefrom is dismissed is that they deposit with the Court RM20,000 by way of security of costs. There will be liberty to apply.

Also found at [1989] 2 CLJ 844